



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

Minutes of the February 11, 2004 meeting of the
Commission on Governmental Ethics and Election Practices
held in the Commission's Meeting Room,
PUC Building, 242 State Street, Augusta, Maine

Present: Chair Andrew Ketterer; Hon. James O. Donnelly; Hon. David N. Ott. Staff:
Executive Director Jonathan Wayne; Counsel Phyllis Gardiner; Administrative
Assistant Kendra Danforth.

At 9:22 a.m., Chair Ketterer convened the meeting. The Commission considered the
following items:

Agenda #2 – Use of Maine Clean Election Act Funds for Legal Expenses

The Commission director introduced the agenda item by stating that Aroostook County Probate Judge James P. Dunleavy was a candidate for State Senate in the 2002 elections. In August 2002, Senator Richard Bennett (then President of the Senate) filed a complaint with the Committee on Judicial Responsibility and Disability claiming that Judge Dunleavy was required to resign from his judicial office in order to run for State Senate, and that his solicitation of political contributions violated the Maine Code of Judicial Conduct. At that time, Judge Dunleavy hired attorney James E. Mitchell to represent him. The Commission director recommended that public funds received under the Maine Clean Election Act (MCEA) should not be used by Judge Dunleavy to pay for his legal defense.

Mr. Mitchell made a presentation to the Commission members. He stated that the complaint against Judge Dunleavy was politically motivated, and that Senator Bennett's political action committee ran radio advertisements and made automated telephone calls claiming that Judge Dunleavy was breaking the law by running for State Senate. Mr. Mitchell stated that Judge Dunleavy had to clear his name, so the legal services were intended to influence the election. He concluded that Judge Dunleavy's legal costs were campaign-related expenditures which could be reimbursed with MCEA funds, and argued that the Commission staff should not retroactively restrict candidates' choices on how to spend MCEA funds as long as they are used for campaign-related expenses.

Mr. Ott stated that he was inclined to adopt the staff recommendation. He said that the Commission does not have the discretion to allow MCEA funds to be spent beyond

campaign-related purposes, and that the Commission would be wandering too far afield of the MCEA if public funds were to be spent for the legal services provided by Mr. Mitchell.

Mr. Donnelly stated that Judge Dunleavy is well-respected as an ethical public official in his community. He said that the legal expenses appeared intended to assist Judge Dunleavy in maintaining his judicial position while he ran for the State Senate, rather than in defending his reputation in his district. He stated his concern that if the Commission permitted the proposed use of MCEA funds, it would open the door to other unintended uses of public funds.

Chair Ketterer said that it was a difficult issue to decide whether Mr. Mitchell's legal services were provided to influence the election, because many actions can have more than one motivation. He observed that some litigation costs would be more directly campaign-related, such as the example raised by Mr. Donnelly of a lawsuit by a candidate to ensure that his name was printed on the ballot. He said that Mr. Mitchell had advanced some compelling arguments, and that Judge Dunleavy was entitled to rely upon statutory authority to conclude that he could run for the State Senate until that statute was ruled unconstitutional in the courts. Chair Ketterer stated that he reluctantly agreed with the view of members Ott and Donnelly that these particular legal expenses did not constitute a campaign-related expenditure.

Mr. Ott moved, Mr. Donnelly seconded, and the members voted unanimously to adopt the staff recommendation that Judge Dunleavy's legal costs were not campaign-related expenditures, and could not be reimbursed with MCEA funds.

The Commission director recommended that the campaign of Ethan Strimling reimburse the Maine Clean Election Fund \$255 for legal research conducted into whether the candidate was prohibited from running for office under the federal Hatch Act. Mr. Donnelly noted that the federal government has an ombudsman program that provides free written guidance on coverage of the federal Hatch Act. Mr. Donnelly moved, Mr. Ott seconded, and the members voted unanimously to adopt the staff recommendation.

Agenda Item #1 – Ratification of Minutes of January 14, 2004 Meeting

Mr. Donnelly moved, Mr. Ott seconded, and the members voted unanimously to adopt the draft minutes of the January 14, 2004 meeting.

Agenda Item #3 – Penalty Determination

The State Committee of the Maine Green Independent Party was one day late in filing the quarterly campaign finance report due January 15, 2004. The staff recommended a penalty of \$36.39, which reflected a 50% reduction of the statutory penalty. Ben Chipman appeared on behalf of the Green Independent Party to request a waiver of the entire penalty. He said that the delay was due to the resignation of the former campaign treasurer and the difficulty that the State Committee experienced in obtaining records of expenditures. Mr. Donnelly moved, Mr. Ott seconded, and the members voted unanimously to adopt the staff recommendation.

Agenda Item #4 – Amendments to Commission Rules

The Commission members considered the major substantive amendments to the Commission Rules that had been tabled from the January 14, 2004 meeting. The amendments had been revised by the Commission staff to respond to the comments offered by the public during the rule-making process. In response to a question from Mr. Ott, the Commission director confirmed that the rule amendments under consideration were the same as those discussed at the January 14 meeting. Mr. Ott moved to provisionally adopt the major substantive rule amendments so that they would be submitted to the Legislature for its consideration. Mr. Donnelly seconded, and the Commission members voted unanimously in favor of the motion.

Agenda Item #5 – Write-In Candidates

The Commission considered a policy proposed by the Commission staff in response to an outside request. Write-in candidates do not meet the legal definition of “candidate” in the Election Law. Under the proposed policy, write-in candidates would be ineligible to receive public funds under the Maine Clean Election Act (MCEA). If a candidate who is participating in the MCEA has no opponent listed on the ballot, that participating candidate would be presumed to be in an uncontested election even if there are one or more individuals running as write-in candidates. In order to rebut this presumption, the participating candidate would be allowed to present evidence to show that the write-in opponent received or spent substantial campaign funds. Upon making such a showing, the Commission could consider the race a contested election and make a distribution of public funds on that basis. Mr. Donnelly moved, Mr. Ott seconded, and the Commission members voted unanimously to adopt the policy recommended by the staff.

Agenda #6 – Campaign Literature for the February 3 Special Election

The Commission members considered a postcard that was mailed to voters in House District #18 on the day of the February 3, 2004 special election. The postcard purports to be an endorsement of the Democratic candidate by the “Coalition for Homosexual Marriage in Maine.” The Republican candidate in the election, Brian C. Pooler, submitted a request for an investigation to the Commission. The Commission director stated that no group was registered with the Commission under that name, and that the group may be fictitious.

Mr. Donnelly stated that the postcard may have violated reporting requirements and that the Commission staff should investigate the matter in coordination with the Attorney General’s Office. Chair Ketterer suggested that it would be more appropriate for the Attorney General’s Office to conduct the investigation. Because of a subsequent, similar mailing purporting to endorse presidential candidate Howard Dean, Mr. Donnelly requested that the Commission staff refer the matter to the Federal Election Commission, and notify the Dean campaign. He requested that the Commission staff inform Mr. Pooler and the other special election candidates of the Commission’s actions.

There being no further business, the Commission adjourned at 11:15 a.m.

Dated: March ___, 2004

Respectfully submitted,

Jonathan Wayne
Executive Director